

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**IN THE MATTER OF:**

**RUAN TRANSPORT CORPORATION,**

Respondent,

AND

**TEAMSTERS LOCAL 705, AFFILIATED  
WITH THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS,**

Complainant.

**CASE NO: 13-CA-46555**

**RESPONDENT'S RESPONSE TO NOTICE TO SHOW CAUSE**

The Respondent, Ruan Transport Corporation (“Respondent”), by its attorneys, and pursuant to Section 102.24 of the Board’s Rules and Regulations, hereby responds to the Motion for Summary Judgment filed on behalf of the General Counsel on March 2, 2011 and the Notice to Show Cause issued by Acting Executive Secretary Lester A. Heltzer on March 3, 2011, and hereby moves for Summary Judgment. In support thereof, Respondent states as follows:

Respondent is conducting a technical refusal to bargain in order to obtain judicial review of the underlying election proceedings and improper Decision and Certification of Representative in 13-RC-21909. (G.C. Ex. 10). Respondent has no obligation to bargain with an improperly certified union. The Certification issued in 13-RC-21909 was improper, in manifest disregard of the evidence and the law, in contravention of Board policy and procedure, and in violation of Respondent’s due process rights. Therefore, Respondent respectfully requests the Board deny the General Counsel’s Motion for Summary Judgment and grant Summary Judgment in favor of Respondent and find that Respondent did not violate the Act by its refusal to bargain.

The Board's Decision improperly concluded that the ambiguous ballot clearly expressed the voter's intent to vote for Teamsters Local 705 ("Local 705") in manifest disregard of established Board precedent providing that such ambiguous, irregularly marked ballots must be declared void. *See e.g. Mercy College*, 212 NLRB 925 (1974); *TCI West, Inc.*, 322 NLRB 928 (1997). Board determinations are scrutinized for coherence and consistency with prior Board decisions, *See Sioux Products, Inc. v. NLRB*, 703 F.2d 1010, 1017 (7th Cir. 1983) (*citing NLRB v. Yeshiva University*, 444 U.S. 672, 691 (1980)), and reviewing courts are quick to overturn as improper decisions that proffer no justification for a departure from precedent. *Id.* at 1018.

Here, Respondent took Exception to the Hearing Officer's complete disregard of established Board precedent from the most analogous case. (Respondent's Exceptions attached as Exhibit 1, p.10 (*citing Mercy College*, 212 NLRB 925 (1974) (ruling ballot void where both boxes contained a complete discernable "X" and one box contained additional heavy shading, because ballot did not evidence the clear, unambiguous intent of the voter))). Yet the Board's Decision contained no discussion of existing Board precedent on irregularly marked ballots. (G.C. Ex. 10). The Decision provides neither reasoning supporting Certification, nor explanation for the departure from precedent. (G.C. Ex. 10). Nor does it attempt to factually distinguish the challenged ballot from the ambiguous and irregular ballots declared void in prior Board decisions. (*Compare* Bd. Ex. 2 (reproduced as an example as: Yes ☒ No ☒), *with, Mercy College*, 212 NLRB 925 (1974) (reproduced as: Yes ☒ No ☒); G.C. Ex. 10).

Despite its contrary boilerplate assertion, the Decision appears to merely adopt the findings and recommendations of the Hearing Officer without considering the evidence in the Record or acknowledging the arguments raised in Respondent's Exceptions. (G.C. Ex. 10).<sup>1</sup>

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<sup>1</sup> The Board's four paragraph Decision states in relevant part:

Without justification for the manifest disregard of Board law, the Board should conclude that Local 705 was improperly certified, thus, the General Counsel's Motion for Summary Judgment should be denied and the Board should reconsider its Decision and Certification of Representative of November 30, 2010.

Additionally, for Certification to be proper it must be supported by substantial evidence in the Record. The sole issue in the underlying representation case is proper interpretation of the ambiguous ballot, thus the only relevant evidence was the original challenged ballot, introduced as Board Exhibit 2. (A copy of which is attached as Exhibit 2). However, there is nothing in the Board's Decision to suggest that the Board even consulted the actual physical ballot in the Record in reaching its Decision. (G.C. Ex. 10; *See Bd. Ex. 2 and Ex. 2*).<sup>2</sup> This was not a case where the Hearing Officer made credibility determinations based on conflicting testimony or disputed facts. Therefore, the Board should not have relied on the Hearing Officer's description of the ballot. Rather the Board should have independently reviewed the original exhibit in the Record, especially given that both Intervenor, Teamsters Local 710 ("Local 710") and Respondent took exception to the Hearing Officer's description of the ballot. (Exs. 1 & 3 excepting to G.C. Ex. 9).

The Hearing Officer's Report incorrectly describes the "X" in the Local 710 box as "barely visible to the naked eye," (G.C. Ex. 9, p. 6). However, a review of the original ballot reveals how erroneous this conclusion was. (*See Bd. Ex. 2 and Ex. 2*). While it is true that the

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The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings and recommendations, and finds that a certification of representative should be issued. We agree with the hearing office that Board's Exhibit 2, a ballot challenged on the basis that it had been irregularly marked, should be counted because it clearly expresses the voter's intent to cast a vote for the Petitioner. . . . (G.C. Ex. 10).

<sup>2</sup> This is increasingly suspect given Respondent's Exceptions — which were filed both electronically and as mailed color originals containing full page, color glossy photographs of the ballot — implored the Board to consult the original ballot in the Record. (Ex. 1).

“X” is barely visible on the black and white photocopy attached to the Hearing Officer’s Report, (G.C. Ex. 9, p. 11), the “X” is readily visible through the purple highlighter on the original ballot. (See Bd. Ex. 2, Ex. 2). Even if one were to conclude that the “X” in the Local 710 is not as crisp as the “X” in the Local 705 box, consulting the original ballot reveals that this is caused by a saturation and degradation of the paper in the Local 710 box due to the voter’s repeated pen strokes darkening the “X” and the multiple layers of highlighter used to emphasize the voter’s choice. This is evidence solely of the quality of paper chosen for the ballot. The Hearing Officer’s assertion — that this shows the voter’s intent to obliterate a mistake (G.C. Ex. 9, p. 9) — completely lacks foundation in the evidence. (See Bd. Ex. 2; Ex. 2).


Respondent’s Exceptions also challenged the Hearing Officer’s characterization of the weight of the X’s in the ballot as blatantly incorrect and a gross mischaracterization of the evidence. (Ex. 1). The Hearing Officer concluded that “it appears that the voter emphasized his selection for Local 705 by ensuring that the mark in this box is a dark black ‘X,’” (G.C. Ex. 9, p. 9), attributing significance to the weight and/or clarity of the “X” as manifesting the voter’s intent. *Cf. Mediplex of Connecticut, Inc.*, 319 NLRB 281, 300 (1995). However, the original ballot shows that the “X” in the Local 705 box consists of two narrow lines, and shows no evidence of repeated strokes or attempts to darken the “X” or make it appear bolder or more apparent. (See Bd. Ex. 2; Ex. 2). The Board failed to consider the only piece of evidence in the Record, the original ballot, thus, the Decision and Certification can not be based on the manifest weight of the evidence in the Record and the Certification is thereby improper. Furthermore, by failing to consider the evidence in the Record (Bd. Ex. 2), and the arguments raised in Respondent’s Exceptions (Ex. 1), the Board has abused its discretion and denied Respondent its due process opportunity to fully litigate the issues in the Representation case.

Respondent submits that serious issues involving Board procedures and potential bias were raised in Respondent's Post Hearing Brief (attached as Exhibit 4) and Respondent's Exceptions (Ex. 1). The Report of the Hearing Officer reflects a results oriented bias in favor of certification of a union and inappropriate consideration of the non-union outcome that would result from following established Board precedent. (G.C. Ex. 9). Adopting these conclusions improperly substitutes the Hearing Officer's choice for the choice of the voter, in violation of fundamental Board neutrality. In this case, the Hearing Officer does not even attempt to qualify her conclusion that "the purple highlighter is the voter's attempt to obliterate his selection for the Intervenor" resolves the ballot's ambiguity. (G.C. Ex. 9). This is nothing more than the Hearing Officer's subjective, unsubstantiated opinion. The three conflicting positions of the parties serve to reinforce the inherent legal question of the ballot's ambiguity. (*See* Exs. 1, 3, 4, 5 & 6). By agreeing with this opinion, the Decision inappropriately defers to the Hearing Officer's interpretation and application of Board law. For all of the above reasons, Respondent respectfully submits that the Board should reconsider its Decision and Certification of Representative of November 30, 2010.

Assuming the Board does not reconsider its earlier decision, the only way that the Respondent may obtain judicial review of the election and post-election proceedings in Case 13-RC-21909 is to conduct a technical refusal to bargain and then to appeal the subsequent findings in the present unfair labor practice case to the United States Court of Appeals. The Respondent is conducting in good faith such a technical refusal to bargain in order to obtain judicial review of the election, post-election proceedings, and the Board's Decision and Certification of Representative.

Respectfully submitted,

**RUAN TRANSPORT CORPORATION**

By:   
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Dated: March 17, 2011

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Charging Party.

**CASE NO. 13-CA-46555**

**CERTIFICATE OF SERVICE**

I hereby certify that on March 17, 2011, a true and correct copy of **RESPONDENT'S RESPONSE TO THE BOARD'S NOTICE TO SHOW CAUSE** was filed electronically via the Board's E-Filing System, and a copy of the same was served, this same date, by certified mail, postage pre-paid upon the following:

Lester A. Heltzer  
Office of the Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> St. N.W.  
Washington, D.C. 20570-0001

Mr. Richard Kelliher-Paz, Counsel for the General Counsel  
National Labor Relations Board, Region 13  
209 S. LaSalle Street, 9<sup>th</sup> Floor  
Chicago, Illinois 60604

Teamsters, Local 705  
Attn: Mr. Edward Burke, General Counsel  
1645 W. Jackson Boulevard  
Chicago, Illinois 60612



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